BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RITA C. AMPARAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,846
C. ALBERT HERDOIZA	)	
Respondent	)	
AND	)	
	)	
COUNTRY COMPANIES, INC. &	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
a/k/a CGU/HAWKEYE-SECURITY COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant, respondent and its insurance companies, Country Companies, Inc., and Commercial Union Insurance Company a/k/a CGU/Hawkeye-Security Company, all requested Appeals Board review of Administrative Law Judge Robert H. Foerschler's January 14, 2000, Award. The Appeals Board heard oral argument on June 14, 2000.

APPEARANCES

Claimant appeared by her attorneys, Dennis L. Horner and Gary P. Kessler both of Kansas City, Kansas. Respondent and its insurance carrier, Country Companies, Inc., appeared by their attorney, J. Paul Maurin, III of Kansas City, Kansas. Respondent and its insurance carrier, Commercial Union Insurance Company a/k/a CGU/Hawkeye-Security Company, appeared by their attorney, S. Margene Burnett of Kansas City, Missouri. Respondent, C. Albert Herdoiza, individually, appeared by his attorney, Billy E. Newman of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

This is a claim for bilateral upper extremity injuries caused by claimant's repetitive work activities over a period of time from May 15, 1995, through claimant's last day worked of January 31, 1996. During this period of accident, respondent was insured by Country Companies, Inc. (Country) through August 9, 1995; respondent was then uninsured from

August 10, 1995, through December 18, 1995; and respondent was insured by Commercial Union Insurance Company (Commercial), since acquired by CGU/Hawkeye-Security Insurance Company, commencing December 19, 1995, through claimant's last day worked of January 31, 1996.

The Administrative Law Judge found claimant's last day worked of January 31, 1996, was claimant's appropriate date of accident. Claimant was awarded a 15 percent permanent partial general disability. The Award was based on orthopedic surgeon Edward J. Prostic M.D.'s 15 percent whole body permanent functional impairment rating. The Administrative Law Judge assessed the Award against the individual respondent and both insurance carriers.

Although raised separately or by one or more of the parties, the issues for Appeals Board review are summarized as follows:

1. What is claimant's appropriate accident date?

2. What is claimant's pre-injury average weekly wage?

3. What is the nature and extent of claimant's disability?

4. What is the appropriate apportionment of liability between respondent and respondent's insurance carriers for the Award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Appeals Board makes the following findings and conclusions:

What is claimant's appropriate accident date?

Claimant was employed by respondent, attorney C. Albert Herdoiza, since 1990 as a legal secretary. Her work duties consisted of transcribing dictation by typing on a computer and filing. Claimant was working an average of 40 hours a week earning $12.00 per hour or $480.00 per week. Sometime around May 1995, claimant started to have symptoms in both hands, forearms, and shoulders. These symptoms were worse in her right shoulder, left arm, and left hand. Claimant is left-hand dominant.

Previously, in 1981, claimant had carpal tunnel syndrome in her right wrist which resulted in a carpal tunnel release. Claimant was also familiar with injured employees' symptoms from performing repetitive work activities because a large part of her employer's legal business involved workers compensation claims. Therefore, when claimant's symptoms persisted, she discussed those symptoms with her employer, Mr. Herdoiza.

This discussion took place on or about May 15, 1995. By mutual agreement, claimant reduced her work days from 5 to 3 days per week. She worked Monday, Thursday, Friday, and was off Tuesday and Wednesday. The payroll records admitted into evidence in the record indicate the first week she started the reduced work week was the week beginning June 5, 1995. Because she remained symptomatic, claimant sought medical treatment on her own in October 1995. She first saw her family physician, Dr. John Sayegh. Dr. Sayegh advised claimant to ease up on her typing and provided her with some medication.

At that time, claimant realized she had at least a potential for a permanent problem and provided Mr. Herdoiza, in October of 1995, with a written claim for compensation. Mr. Herdoiza, in turn, notified his insurance carrier of the claim.

A representative of Country contacted claimant on December 1, 1995, and took a statement from claimant concerning the claim. The representative also made arrangements for claimant to be examined and treated by Lynn D. Ketchum, M.D. On December 20, 1995, Dr. Ketchum first examined claimant and found her with complaints of pain in her right shoulder, left medial epicondyle, and in both hands. The doctor had claimant undergo a nerve velocity test of the median nerve, which was, for the most part, within normal limits. He restricted claimant's typing activities to 4 to 6 hours per day and recommended an ergonomically correct chair with a lumbar roll. Claimant was also placed in a physical therapy program for three weeks.

Claimant saw Dr. Ketchum again on January 31, 1996, with improvement. Claimant was instructed to continue stretching exercises for her left arm complaints and moist heat for her right shoulder problem. Dr. Ketchum released claimant to return as needed.

Although claimant continued to work on a reduced work schedule, she was asked if the condition of her hands and shoulders improved. She replied, "Not really." Claimant terminated her employment with the respondent on January 31, 1996. She testified her problems with her hands and shoulders had not improved. Claimant indicated she was afraid, if she continued to work, she would put herself in a position where surgery would be needed. Claimant had previously experienced a problem with anesthetic when she had the 1981 carpal tunnel release.

Claimant told Dr. Ketchum at her last appointment on January 31, 1996, that she had made the decision to quit her job in an effort to see whether this would help her symptoms. Claimant testified that Dr. Ketchum admired her for quitting because people are usually not willing to give up the job that is causing the problem.

After claimant left her employment with the respondent, her right shoulder symptoms improved and unless she performed repetitive activities such as typing, her hands and arms remained asymptomatic.

Orthopedic surgeon Edward J. Prostic, M.D., was the only physician to testify in this case. Claimant was acquainted with Dr. Prostic because while she was employed by Mr. Herdoiza, she had been used as an interpreter for some of Mr. Herdoiza's non-English speaking clients when those clients were examined and evaluated by Dr. Prostic. Because claimant knew Dr. Prostic, she requested him to examine her for her right shoulder and bilateral arm complaints.

Dr. Prostic first saw claimant on May 16, 1996. He diagnosed claimant with severe right rotator cuff tendinitis with a partial thickness tear, bilateral epicondylitis, tendinitis of the forearms, and bilateral radial tunnel syndrome. At that time, Dr. Prostic injected claimant's right shoulder with Celestone Soluspan and Xylocaine and placed claimant on anti-inflammatory medication. Dr. Prostic was asked, "If she (claimant) continued to perform repetitive duties at work following May 15, 1995, would you assume that she (claimant) continued to injure herself by doing those same activities?" The doctor replied, "Yes." Dr. Prostic went on to testify that, after the reduction in claimant's hours of work in June 1995, her condition did not worsen but her continued performance of the repetitive work duties, did continue to aggravate her condition. In fact, the doctor testified, after claimant quit respondent's employment, her condition considerably improved.

The Administrative Law Judge found claimant's appropriate accident date was the last injurious exposure she had with the employer, which was January 31, 1996, the last day she worked. But the claimant, respondent, and respondent's insurance carrier, Commercial, all argue that claimant's appropriate date of accident is May 15, 1995, the date claimant and respondent mutually agreed to reduce claimant's working hours from five days per week to three days per week. They contend that when claimant reduced her hours of work this resulted in claimant performing an accommodated job not substantially the same as her previous job the claimant had performed. Therefore, they argue the appropriate date of accident in a repetitive use injury or a micro-trauma case is the last day claimant performed the earlier work tasks.[1]

Respondent's insurance carrier, Country, however, contends the Administrative Law Judge was correct and claimant's appropriate accident date in this repetitive trauma case is the last day she worked for the respondent, January 31, 1996. Country argues, although claimant reduced her hours of work on or about May 15, 1995, she continued to perform the offending repetitive work activities of typing and filing. Those repetitive work activities continued to aggravate her bilateral upper extremities, and claimant remained symptomatic. Claimant quit her job with the respondent because of those continuing symptoms. Accordingly, Commercial contends claimant's appropriate accident date is January 31, 1996, her last day worked.[2]

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[1] *See* Treaster v. Dillon Companies, Inc., 267 Kan. 610, Syl. ¶4, 987 P.2d 325 (1999) and Cozad v. Boeing Military Airplane Co., 27 Kan. App. 2d 206, 2 P.3d 175 (2000).

[2] *See* Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 227, 885 P.2d 1261 (1994) and Lott-Edwards v. Americold Corp., 27 Kan. App. 2d ___ , Syl. ¶ 4, 6 P.3d 947 (2000).

The Appeals Board agrees with the Administrative Law Judge's conclusion and Country's contention that claimant's appropriate accident date is January 31, 1996, her last day worked. The Appeals Board finds this conclusion is supported by both the claimant's testimony and the opinions of Dr. Edward Prostic. Claimant's testimony supports the conclusion that, even after she reduced her hours per week of work, she continued to aggravate her bilateral upper extremity condition causing her to have continuing symptoms. The reason she terminated her employment with the respondent was because of those continuing symptoms and her fear that if she did continue to perform those work activities she would need surgery. Dr. Prostic attributed claimant's bilateral upper extremity injuries to her repetitive work activities. The doctor further opined, after claimant reduced her hours of work, her injuries did not worsen but her continuing performance of those work duties aggravated her condition and she remained symptomatic. Dr. Prostic also later placed work restrictions on claimant that would not have allowed her to continue in her employment with the respondent.

What is claimant pre-injury average weekly wage?

The parties agree the record establishes that claimant was earning $12.00 per hour and working an average of 40 hours per week when she and Mr. Herdoiza mutually agreed, on or about May 15, 1995, that she should reduce her work week because of her bilateral upper extremity symptoms. The record does not contain any evidence that claimant was paid overtime or that Mr. Herdoiza provided claimant with any fringe benefits. Accordingly, claimant's pre-injury average weekly wage on May 15, 1995, was $480.00 per week.[3]

The question then arises as to what was claimant's pre-injury average weekly wage for the January 31, 1996, accident date as found above. The respondent and Commercial contend claimant's pre-injury average weekly wage for the January 31, 1996, accident date is computed by taking the gross amount of money claimant earned during the 26 calendar weeks immediately preceding the January 31, 1996, accident date and dividing the amount by 26 weeks. Added to this weekly amount should be the average weekly value of any additional compensation and the employee's average weekly overtime.[4]

In this case, claimant, because of her work-related injuries, with the mutual agreement of the respondent, reduced her weekly hours of work in an effort to lessen the effect of her repetitive work activities on her bilateral upper extremities. The Appeals Board concludes that claimant's pre-injury average weekly wage should be computed as if she was a full-time employee on the date of accident because she reduced her hours of work in an effort to reduce the effects her work activities were having on her upper extremities. Even with the temporary reduced work schedule, claimant's repetitive work activities

[3] *See* K.S.A. 44-511(b)(4)(B).

[4] *See* K.S.A. 44-511(b)(4)(A) and (5).

continued to cause injury to her upper extremities and resulted in her terminating her employment with respondent.

The Appeals Board finds claimant suffered repetitive trauma injuries caused by a series of accidents, not a single accident. The last day worked that determines the date of accident in a repetitive trauma case is a legal fiction for the assessment of permanent disability benefits.[5] Therefore, the Appeals Board finds claimant's appropriate pre-injury average weekly wage is $480.00 per week based on claimant's wage at the time before she reduced her hours of work as the result of her work-related injuries.

What is the nature and extent of claimant's disability?

The Administrative Law Judge awarded claimant a 15 percent permanent partial general disability based on the 15 percent whole body permanent functional opinion of Dr. Prostic, the only physician who testified in this case. Dr. Prostic also treated claimant for her upper extremity injuries. He first saw claimant on May 16, 1996, and last examined claimant on August 2, 1999, when he found claimant improved because she was no longer performing the repetitive typing and filing activities. In fact, Dr. Prostic had rated claimant with a 22 percent whole body permanent functional impairment as of January 29, 1999. But because of claimant's improvement, he reduced the rating for the right shoulder tendinitis and the bilateral radial tunnel syndrome to a 15 percent whole body impairment rating.

The respondent and both insurance carriers contend that claimant's permanent functional impairment should be based on Brian E. Healy, M.D.'s examination and evaluation of claimant. Dr. Healy was appointed by the Administrative Law Judge to perform an independent medical examination of claimant. He saw claimant on one occasion on November 16, 1998. Dr. Healy's deposition was not taken and the only evidence contained in the record is his November 16, 1998, letter report to the Administrative Law Judge.

Dr. Healy acknowledged that claimant had a number of upper extremity anomalies but only examined and rated claimant's right shoulder injury. He assessed claimant's right shoulder injury as a 10 percent permanent functional impairment of the right upper extremity and converted that rating to a six percent whole body permanent functional impairment rating.

The Appeals Board concludes, as did the Administrative Law Judge, that claimant suffered permanent work-related injuries not only to her right shoulder but also to her bilateral forearms while employed by the respondent. The Appeals Board finds the most persuasive functional impairment rating contained in the record is Dr. Prostic's 15 percent whole body functional impairment rating. Dr. Prostic treated claimant and saw claimant

[5]Lott-Edwards, 6 P.3d at 955.

over a period of time from May 16, 1996, through August 2, 1999. Dr. Prostic also testified in this case. The Appeals Board finds Dr. Prostic was overall in the best position to evaluate the nature and extent of claimant's injury and disability.

The claimant, however, makes a claim for a higher permanent partial general disability award based on a work disability. Claimant argues she established she suffered a 78 percent loss of income in 1996, an 84 percent loss of income in 1997, and a 22 percent los of income in 1998. Claimant also contends she proved through Dr. Prostic's testimony that she had a 75 percent work task loss as a result of her work-related injuries.

K.S.A. 44-510e(a) defines work disability as the average of wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage that is 90 percent or more of the pre-injury average weekly wage.

After a worker is no longer employed because of work-related injuries, the worker has a duty to make a good faith effort to find appropriate work. Absent such a showing, the fact-finder must impute to the worker a reasonable wage based on all relevant factors including the testimony of a vocational expert in regards to the worker's ability to earn a wage.[6]

The claimant contends she is entitled to a work disability following her termination from her employment with the respondent for 1996, 1997, and 1998. Her income records submitted into evidence indicate claimant earned $5,202 in 1996; $3,725 in 1997; and $19,076 in 1998. She testified, at the regular hearing held on August 31, 1999, that her income for 1999 would be better than the income she earned in 1998. Therefore, claimant did not argue her entitlement to a work disability for 1999.

There is no vocational expert opinion on claimant's ability to earn wages after her termination from respondent's employment. Claimant's earnings for 1996, 1997, and 1998 consist of income from sale of Mary Kay Products, returning to work for Mr. Herdoiza on an independent contractor basis, part-time telemarketing employment in the latter part of

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[6] *See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

1997 and early 1998, and income from services provided as an interpreter for Mr. Herdoiza, other attorneys, and state and local courts.

After claimant terminated her employment with respondent, she was not restricted from working a full-time job that did not require repetitive typing and filing. The Appeals Board finds claimant has demonstrated she has the ability to perform other jobs not requiring typing and filing and to earn income that is at least 90 percent or more of her pre-injury average weekly wage. The Appeals Board finds claimant has failed to prove she made a good faith effort in 1996, 1997, and 1998 to find appropriate employment. The Appeals Board, therefore, finds claimant retained the ability, after she terminated her employment with the respondent, to earn 90 percent or more of her pre-injury average weekly wage and she is thus limited to an award based on her 15 percent permanent functional impairment rating.

What is the appropriate apportionment of liability between respondent and respondent's insurance carriers for the Award?

The Administrative Law Judge assessed the Award against the respondent, C. Albert Herdoiza, and his insurance companies, Country Companies, Inc. and Commercial Union Insurance Company, without apportioning the liability between the two insurance carriers. As previously noted, this is a claim for repetitive trauma injuries which were sustained by a series of accidents over a period of time from May 15, 1995, and cumulating on claimant's last day worked of January 31, 1996. Country's coverage period ended on August 9, 1995. Commercial's coverage began on December 19, 1995, and continued through claimant's last day worked and her accident date of January 31, 1996.

The Appeals Board concludes Country is responsible for temporary total disability and medical expenses incurred for the repetitive trauma injuries claimant sustained over the period of accident during it's period of coverage. Likewise, Commercial should be responsible for all temporary total disability compensation and authorized medical treatment incurred during it's period of coverage plus permanent partial disability compensation and any other benefits owed after the January 31, 1996, accident date. Accordingly, Commercial should reimburse Country for any temporary total disability compensation and authorized medical expenses incurred and paid by Country after Commercial's coverage commenced.[7]

The Appeals Board acknowledges respondent was uninsured for the period from August 10, 1995, through December 18, 1995. But the Appeals Board finds the record does not establish that claimant obtained any medical treatment or was entitled to any temporary total weekly disability benefits during this period. Therefore, the Appeals Board has not assessed respondent, as an individual, with any liability in this case.

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[7] Lott-Edwards , 6 P.3d at Syl. ¶ 9.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge Robert H. Foerschler's January 14, 2000, Award should be, and is hereby, affirmed as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rita C. Amparan, and against the respondent, C. Albert Herdoiza, and its insurance carriers, Country Companies, Inc.[8] and Commercial Union Insurance Company, for an accidental injury sustained on January 31, 1996, and based upon an average weekly wage of $480.00.

Claimant is entitled to 62.25 weeks of permanent partial disability at the rate of $320.02[9] per week for a 15% permanent partial general bodily disability award in the sum of $19,921.25, which is all due and owing and is ordered paid in one lump sum less any amount previously paid.

Claimant is entitled to unauthorized medical expense upon presentation of the statement up to the statutory maximum of $500.

Claimant is entitled to future medical treatment upon proper application to and approval by the Director.

All authorized medical expenses are ordered paid by the respondent and its insurance carrier.

The cost of the transcripts and the record are taxed against the respondent and its insurance carriers as follows:

Hostetler & Associates, Inc.	$1,703.46

IT IS SO ORDERED.

Dated this ____ day of October 2000.

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[8]Because there was no temporary total disability compensation awarded, Country's liability is limited to only the authorized medical expenses incurred during its coverage period that ended August 9, 1995.

[9]The Administrative Law Judge computed the award based on a maximum weekly compensation rate of $326.00 in effect for a January 31, 1996 accident. But the Appeals Board found claimant's pre-injury average weekly wage was $480.00 per week which results in a weekly compensation rate of $320.02 instead of $326.00.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents with the majority's decision regarding claimant's average weekly wage.

The majority opinion finds claimant's appropriate date of accident to be January 31, 1996, her last day worked with respondent. Considering the long line of appellate cases dealing with date of accident, this Board Member concurs that claimant's date of accident would be her last day worked. *See* Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999); Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

However, the majority opinion then computes claimant's average weekly wage based upon claimant's earnings as of May 15, 1995. This was the date the claimant and her employer agreed to reduced claimant's work week from five days to three. This should have effectively reduced claimant's average weekly wage from $480.00 per week, representing $12.00 per hour times 40 hours per week, to $288.00 per week, representing $12.00 per hour times 24 hours per week.

The majority noted that the date of accident in a repetitive trauma case is a legal fiction for the purpose of assessing permanent disability benefits. The majority correctly found claimant's last day worked to be that date. However, the Board then concluded that an average weekly wage from a different date should be utilized in determining the level of claimant's benefits. That decision in effect mixes apples and oranges. By bifurcating the date applicable for determining the date of accident and the date applicable for computing an average weekly wage, the Appeals Board has added a very confusing element to the already confusing date of accident quandary in micro trauma situations.

The Kansas Supreme Court in Treaster, affirming the logic of Berry, found the last day worked to be an appropriate date of accident for purposes of workers compensation benefits. The Court clearly disagreed with allowing claimants and respondents to pick dates of accidents that best served their financial purposes. That is the end result in this instance. The majority, by using one date for the purpose of establishing claimant's date

of accident and a totally separate date months earlier to establish claimant's average weekly wage, violates the Supreme Court's attempt to eliminate manipulation in micro trauma situations.

This Board Member would find claimant's date of accident to be January 31, 1996, claimant's last day of work with respondent, with an appropriate average weekly wage computed as of that date.

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Gary P. Kessler, Kansas City, KS
Billy E. Newman, Topeka, KS
J. Paul Maurin III, Kansas City, KS
S. Margene Burnett, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director